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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 370

THE UNITED STATES, PETITIONER

v.

BRANCH BANKING AND TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cases on July 9, 1951.

OPINIONS BELOW

The opinion of the Court of Claims sustaining the demurrer to the Government's special plea in fraud (R. 21-26) is reported at 87 F. Supp. 777. The opinion of the Court of Claims awarding respondents $292,170.85 (R. 34-43) is reported at 98 F. Supp. 757.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1951 (R. 43). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a contractor who submits fraudulent vouchers with respect to some items of performance of a Government contract, and receives payment thereon before his fraud is discovered, forfeits the right to recover the unpaid balance otherwise due on the non-fraudulently performed items of the contract.

STATUTE INVOLVED

28 U.S.C. 2514 provides as follows:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
>
> In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

STATEMENT

Respondent joint venturers, in these two consolidated actions, seek to recover the unpaid balance of $292,170.85 allegedly owing to them on two contracts with the Government—a cost-plus-a-fixed-fee contract executed in December, 1940 (No. W-6826 qm-2), and a lump sum contract executed in May, 1942 (No. W-982-eng-1442). In opposition to these claims, the Government raised two defenses: (1) a special plea in fraud under 28 U.S.C. 2514 as to the cost-plus-a-fixed-fee contract, and (2) a counter-claim of $292,080.29

against both claims because of profits realized in that amount by two of the joint venturers under the cost-plus-a-fixed-fee contract, allegedly in breach of their covenant not to take any profit apart from the fixed fee. Both defenses were rejected by the court below, and judgment was entered against the United States in the sum of $292,170.85. With respect to the issue of fraud, the undisputed facts are as follows:

In December, 1940, the United States entered into a cost-plus-a-fixed-fee contract (No. W-6826 qm-2) with the Grannis, Higgins, Thompson & McDevitt Company, a joint venture, for the construction of an anti-aircraft firing center, later known as Camp Davis, near Wilmington, North Carolina. The contract was signed by E. W. Grannis, an individual, F. N. Thompson, an individual, V. B. Higgins, an individual trading as the V. B. Higgins Company, and J. J. McDevitt Company, a corporation, jointly and severally (Fndg. 3, R. 27-28).[1]

The fee fixed, $270,942, (Fndg. 3, R. 28), was in accordance with Article I of the contract, to "constitute complete compensation for the contractor's services, including profit and all general overhead expenses." (Fndg. 3, R. 28). It was agreed that the contractor would (Article V, par. 1) "at all times use his best efforts in all acts here-

[1] On December 8, 1948, the Branch Banking and Trust Company and Mrs. Edward W. Grannis, coadministrators of the estate of E. W. Grannis, were substituted as a party plaintiff in lieu of E. W. Grannis, who was killed in an airplane accident in September, 1948 (R. 16).

under to protect and subserve the interest of the Government." (Fndg. 4, R. 28).

The work provided for in the contract was completed and accepted by the Government, the contract having been terminated at the convenience of the Government on May 29, 1941 (Fndg. 7, R. 29). A total of $242,170.85 remains unpaid on the contract, consisting of a balance of $61,111.50 of the fixed-fee of $270,942 and $181,059.35 of reimbursable expenditures (Fndgs. 8, 9, R. 29).

Under the terms of the cost-plus-a-fixed-fee contract for the construction of Camp Davis, rental for equipment owned by respondents was computed on the basis of the fair valuation of the equipment at the time of its arrival at the site. When the total rental paid equalled the value of the equipment, plus one percent per month during its use, title vested in the Government and no further rental was to be paid. The rental schedule allowed reimbursement for depreciation, taxes, insurance, storage and interest on the investment, but excluded profit. Rental paid for the use of equipment owned by third parties was also allowed as an expenditure under the contract. Although equipment rented from third parties was subject to recapture by the United States when the total rental paid equalled the value placed on the equipment, such rental was at a rate which included a profit to the third party owner, and third parties were not required to account to the United States for rebates received by them. Thus the rental allowed the contractor for

third party equipment exceeded rental allowed for his own equipment (R. 22).

Shortly after work began under the contract, a rental agreement was executed between the joint venture, and one William R. Jones, the brother-in-law of E. W. Grannis, a co-venturer, and 130 automobiles, trucks and cars were entered on the rental rolls in Jones' name (R. 18, 22). A separate schedule for each of the 130 cars, executed by Jones and the Government's representative, was attached to the rental agreement. The rentals in these schedules were third party rentals and consequently larger in amount than they would have been had it been shown that the equipment was owned by the joint venture (R. 18, 23).[2]

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[2] At the time of these transactions, Jones was not in the automobile business, and did not own any automobiles, trucks or cars. He had neither the financial ability nor bank credit to enable him to finance the purchase of the equipment rented in his name to respondents (R. 18). In fact, Grannis, through his office manager, Karl Sloan, furnished all the funds and financing necessary to acquire the equipment which was represented to be the property of Jones. The cars and trucks involved were purchased through accounts established by Sloan in two banks at Fayetteville, North Carolina, in the name of "W. R. Jones by K. Sloan." (R. 18). The funds for these accounts were provided by bank loans totalling $77,091.37 which were guaranteed by Grannis, and by a cash deposit in the amount of $20,000 made by Grannis (R. 18). Jones played no part in negotiating the loans, except to sign the notes and chattel mortgages on the equipment which were given to the banks, and he supplied no funds for the bank accounts (R. 18). Sloan controlled the accounts and was the only one authorized to draw checks on the accounts (R. 18). Checks for the rental of the equipment were forwarded by the joint venture to Jones, addressed to the post office box of Grannis, and came into the possession of Sloan, who deposited them in the accounts (R. 18).

On various dates, respondents issued ten vouchers aggregating $260,539.14, to the United States covering the rental of the vehicles. Had respondents not misrepresented the ownership of this equipment, the vouchers would have amounted to $228,184.38. By reason thereof, respondents issued vouchers for, and were paid, $32,355.03 more than they were entitled to receive (R. 23).

Upon discovery of these facts, suit was brought by the United States against Grannis and Jones in the District Court for the Eastern District of North Carolina to recover damages and forfeitures for violation of the false claims statute (R.S. 3490, 31 U.S.C. 231). A jury verdict in the defendants' favor was reversed by the Court of Appeals for the Fourth Circuit, which directed the district court to enter judgment against the defendants for double the amount of damages sustained by the United States, plus the sum of $2,000 on each of the ten fraudulent vouchers—a total of $84,710.06. *United States* v. *Grannis, et al.*, 172 F. 2d 507.[3] The defendants' petition for a writ of certiorari was denied by this court. 337 U.S. 918.

After the Court of Appeals for the Fourth Circuit had found Grannis guilty of the fraud related above, the Government, in the instant proceedings, entered a special plea in fraud under 28 U.S.C. 2514 as to the cost-plus-a-fixed-fee contract, asking

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[3] A more detailed discussion of the facts relating to the fraud practiced by Grannis is set forth in the opinion of the Court of Appeals in that case.

for the forfeiture of the balance of the fixed-fee in the sum of $61,111.50 (R. 17-19).[4] Respondents demurred to the plea on the ground that the plea does not state facts sufficient to constitute a cause of defense in that no fraud is alleged in the special plea with reference to that part of the petition before the court, which consists of two vouchers covering payment of the balance of the fixed-fee (R. 20, 23). After hearing argument, the court below, two judges dissenting, sustained the demurrer (R. 27). The court then proceeded to hear evidence on the merits of the Government's separate defense of counter-claim of $292,080.29 against both contracts. This defense was also rejected by the court below, and judgment was finally entered against the United States in the sum of $292,170.85 (R. 43).

REASONS FOR GRANTING THE WRIT

Despite admitted fraud in the performance of the contract involved in this case, the majority of the court below has declined to render judgment of forfeiture under 28 U.S.C. 2514 of the unpaid balance of the fixed-fee under that contract, holding that the fraud was not committed in connection with the claim sued on. This anomalous ruling, we submit, finds no support in the language of the statute or its legislative history. And since the act

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[4] On May 18, 1949, the Government filed a counter-claim and special plea in fraud. On July 26, 1949, the Government moved to withdraw that pleading and to file, in lieu thereof, the special plea in fraud here in issue. The motion was granted on August 12, 1949 (R. 16).

is one of general applicability to all claims filed in the Court of Claims, and is "a part of every contract with the United States" (*Globe Indemnity Co.* v. *United States*, 84 C. Cls. 587, 594), its proper interpretation presents a question of substantial importance which calls for authoritative resolution by this Court.

1. Although Section 2514 was passed in its original form without debate (Section 11 of the Act of March 3, 1863, 12 Stat. 765, 767),[5] its origin and purpose are made manifest by the historical setting of its enactment. By 1863, procurement frauds in the conduct of the Civil War had become notorious.

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[5] Section 11 of the Act of March 3, 1863, was one section of an Act to amend the Act of February 24, 1855, 10 Stat. 612, which established the Court of Claims. The chief purpose of the several amendments was to authorize the court to render final judgments. Consequently, debate was primarily directed towards this question, and little was said as to the proposed forfeiture provision. Reference to the forfeiture provision of the bill (H.R. 226) appears only in three places. The report of the House Judiciary Committee on the bill, reported out to the House by Mr. Porter, states with respect to the forfeiture provision, that "to provide further against attempts to practice frauds upon the government in the proof, statement, establishment, or allowance of any claim, the bill contains a provision that a corrupt attempt to practice such frauds shall work a forfeiture of the particular claim." H.R. Rept. No. 34, 37th Cong., 2d Sess., p. 3. Identical language was used by Mr. Porter on the floor, in his introductory remarks explaining the bill. See Congressional Globe, 37th Cong., 2d Sess., App. pp. 123, 124. The last reference thereto was made by Mr. Bingham, also a member of the Judiciary Committee, who observed that "it is very wisely provided that if there be any fraud practiced, or attempted to be practiced, upon the part of any claimant against this Government in the demand or establishment of his claim, such act of fraud upon his part shall forever forfeit his claim, no matter what it may be." Congressional Globe, 37th Cong., 2d Sess., p. 1674.

In January, 1862, the Michigan legislature, by resolution, observed that "traitors, in the disguise of patriots, have plundered our treasury, destroyed our substance, and paralyzed our efforts, by a system of fraud and peculation" and petitioned Congress for legislation making such commission of frauds "a felony, punishable by imprisonment for years, or for life; or, if the exigencies of the case shall require it, during the war, like treason, by death upon the gallows." Sen. Misc. Doc. No. 34, 37th Cong., 2d Sess. In July, 1862, a committee of the War Department exposed frauds of nearly $17,000,000 in contracts amounting to $50,000,000. See 5 Rhodes, *History of the United States* (1928 ed.), pp. 214ff. Further outrageous frauds were uncovered by Congressional Committees. See H.R. Rept. Nos. 49, 50, 37th Cong., 3d Sess.; S. Rept. No. 84, 37th Cong., 3d Sess.; H.R. Rept. No. 2, 37th Cong., 2d Sess. (v. i, v. ii). On the floor of Congress, the gross frauds which had been practiced against the United States were denounced in the strongest terms. Thus, in a speech fully reflecting the prevailing feeling of outrage, Senator Pomeroy declaimed that "[illegible] is one of the crying evils of the period, if report is in any degree to be credited, that our Treasury is plundered from day to day by bands of conspirators, who are knotted together in this city and other large cities for the purpose of defrauding and plundering the Government." Congressional

Globe, 37th Cong., 3d Sess., p. 955; see generally *Id* at pp. 952-958.

In March, 1863, these investigations culminated in legislation imposing stringent penalties. On March 2, a law was enacted which exacted a penalty of $2,000 for each fraudulent bill, receipt, voucher, account, statement, affidavit, or deposition employed to obtain the allowance or payment of a claim and which entitled the Government to recover double the damages it sustained. In addition, criminal sanctions were provided. Act of March 2, 1863, 12 Stat. 696, 698 (now 31 U.S.C. 231, 18 U.S.C. 287, 1001).

On the following day, March 3, the forfeiture provision here in issue came into force. It read as follows (12 Stat. 765, 767):

> That any person or persons who shall corruptly practise or attempt to practise any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim against the United States, shall ipso facto forfeit the same to the Government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practised or attempted to be practised, and thereupon give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. * * *

On its face, this original form of Section 2514 provided that fraud with respect to "any part of any

claim" would work a forfeiture of "such claim" and that the claimant would "be forever barred from prosecuting the same."

Until the instant case, the Court of Claims had given full effect to the plain meaning of the Act and the manifest Congressional purpose behind it. The court early announced that the Act, "while harsh in its application, must be enforced rigidly, in order to protect the Government against the payment of false and fraudulent claims." *Furay* v. *United States,* 34 C. Cls. 171, 174. "Harsh as the statutes are which impose such severe penalties for fraud in making up a claim, it is yet a necessary statute for the protection of the Government, and when such a charge is established this court will not only not hesitate to enforce such penalties but will go to whatever extreme under the law which can be justified by the facts proven." *New York Market Gardeners' Ass'n* v. *United States,* 43 C. Cls. 114, 136. In this spirit, the court had consistently held that fraud in the proof, statement, establishment, or allowance of a part of a claim would cause the entire claim to be forfeited. *Furay* v. *United States, supra; Blume* v. *United States,* 81 C. Cls. 210, 214; *Globe Indemnity Co.* v. *United States,* 84 C. Cls. 587, 593-594; *Jerman* v. *United States,* 96 C. Cls. 540; *Irwin & Leighton* v. *United States,* 106 C. Cls. 398, 458, 460, 461-462.

In the case at bar, the Court of Claims has inexplicably disregarded this reading of the Act and

eviscerated its mandate by not requiring the forfeiture of the non-fraudulently performed items of the contract. Certainly, this decision cannot be justified by any difference between the present language of Section 2514 and its original form.[6] Indeed, the court places its reliance on the original language of the Act and its legislative history. But the legislative history referred to by the court (R. 24-25; see also note 5, *supra,* p. 8) provides scant basis for the distinction here drawn between the earlier cases which exacted a forfeiture of the entire contract where suit was based in part on fraudulent vouchers and the case herein where the fraudulent vouchers were paid prior to discovery of the fraud and suit is based entirely on non-fraudulent vouchers.

Admittedly, that legislative history reveals that the only claim forfeited is the particular claim as to which the fraud was attempted. Cf. *Crovo* v. *United States,* 100 C. Cls. 368.[7] But that limitation upon the reach of the Act cannot justify the result reached by the majority of the court below unless it be assumed that the word "claim" is

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[6] The original language of the Act of 1863 was retained in the subsequent codifications prior to the 1948 revision of the Judicial Code. See R.S. 1086 and Section 172 of the Act of March 3, 1911, 36 Stat. 1087, 1141, 28 U.S.C. (1946 ed.) 279. The Reviser's Note to Section 2514 states merely that changes were made in phraseology. See 28 U.S.C.A. 2514, Historical and Revision Notes.

[7] In the *Crovo* case, the Government unsuccessfully filed a plea of set-off based on a fraud allegedly committed from six to nine years prior to the transactions which were the basis of claimant's suit.

synonymous with voucher, rather than contract, so that each voucher constitutes a separate "claim". To make that assumption, however, is to attribute to the Civil War Congress which enacted the statute —a Congress fully cognizant of notorious war procurement frauds (see *supra,* pp. 8-10)—an intention to permit unscrupulous contractors to defraud the Government with relative impunity. That intention, we submit, should not be ascribed without an affirmative showing. In fact, as we have shown above, the available evidence points the other way. As already noted, the same Civil War Congress enacted the Act of March 2, 1863, 12 Stat. 696, 698, which imposed a forfeiture of $2,000 for each fraudulent voucher used "for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim," awards the Government double damages, and provides, in addition, for criminal sanctions. Taken together, the two Acts form a comprehensive statutory scheme only if the Act here involved is read as requiring the additional sanction of forfeiture of all rights under the contract. To interpret the Act as providing for forfeiture of the fraudulent vouchers alone is to render it virtually meaningless since it would have no application to vouchers paid prior to the discovery of the fraud connected therewith.

Moreover, to read the word "claim" as synonymous with voucher palpably fails to provide any basis for the distinction drawn below between the

unscrupulous contractor who succeeds in obtaining payment prior to the discovery of his fraud and the equally unscrupulous but less adroit contractor whose fraudulent vouchers form part of his claim before the court. If each voucher constitutes a separate "claim," even the claimant who presents fraudulent and non-fraudulent vouchers to the Court of Claims would be entitled to recovery on the non-fraudulent vouchers. As pointed out above, however, the court below has many times held that all the vouchers are vitiated, that Section 2514 "withdraws the consent of the United States to be sued upon any contract or transactions in connection with which any claimant has practiced or attempted to practice fraud." *Globe Indemnity Co.* v. *United States, supra,* at 594.

Finally, that reading of the word "claim" in Section 2514 would be in conflict with the well-established interpretation given the same word in 28 U.S.C. 2501, which bars suit on "every *claim* of which the Court of Claims has jurisdiction * * * unless the petition therein is filed, or the *claim* is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such *claim* first accrues." [Emphasis added.] Section 2501 has consistently been construed as not barring suit upon vouchers issued, or items of damages arising, more than six years prior to suit if suit is brought within six years of the completion and acceptance of the contract work. *Myerle* v. *United States,* 33 C. Cls. 1, 21, 22;

Austin Engineering Co. v. *United States,* 88 C. Cls. 559; *Joplin* v. *United States,* 89 C. Cls. 345, 355-356, 362-363; *B-W Construction Company* v. *United States,* 100 C. Cls. 227, 235; cf. 6 Williston, *Contracts* (Rev. Ed.), § 2028. Since Sections 2501 and 2514 are derived from, and were originally enacted as, two sections of the same statute (Act of March 3, 1863, 12 Stat. 765, 767, §§ 10, 11), and should, therefore, be read in *pari materia,* it may properly be inferred that the word "claim" was intended to have a uniform construction.

In summary, as the minority below observed, "the forfeiture statute was not intended to forfeit an otherwise valid claim of a claimant merely because, in some other unrelated transaction, he had defrauded the Government. But where the alleged fraud was committed in regard to the very contract upon which the suit is brought, * * * the court does not have the right to divide the contract into separate items, and allow recovery on some items, although other items were dishonestly performed. That would mean that if one contracted to deliver hay, oats, and corn to the Government at unit prices for each commodity, based on units of weight, and he presented false weights for the oats, but not for the hay or corn, he could obtain a judgment against the Government for the hay and corn. * * * the claim to which the statute refers is, in the case of the contract, the claim to enforce the contract. Much or little of it may remain unper-

formed by the Government at the time the suit is brought, but the suit is on the contract, and the contract, the basis of the claim, is * * * forfeited." (R. 26).

2. Should this petition be granted, the Government intends also to urge that, even assuming that Section 2514 exacts the forfeiture of only those vouchers permeated with fraud, the court below erred in not rendering judgment of forfeiture of the balance of the fixed-fee. Respondents' right to receive payment of the fixed-fee is implicitly conditioned upon the faithful performance of their undertakings under the contract. One of the undertakings was their covenant to use, at all times and in all acts under the contract, their best efforts "to protect and subserve the interest of the Government." (Art. V, par. 1(g); Fdng. 4, R. 28). Respondents further agreed that the fixed-fee "shall constitute complete compensation for the Contractor's Services, including profit and all general overhead expenses." (Art. 1, par. 1(c); Fdng. 3, R. 28). Plainly, respondents breached these undertakings by fraudulently overstating their costs of performance and obtaining thereby some $32,000 more profit than they were entitled to under the contract. *Supra,* pp. 4-6. It follows, therefore, that such fraud in the performance of the contract taints the vouchers here in question and requires their forfeiture. See *New York Market Gardeners Ass'n* v. *United States, supra* at 136.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1951.

[8] In addition, the Government reserves the right to raise the further question whether, in the circumstances of this case, the Government is estopped to insist upon the cost-plus-a fixed-fee provision of the Camp Davis contract by the action of its contracting officer in authorizing the joint venture, which had undertaken to perform the contract for cost-plus-a-fixed-fee, to enter into subcontracts with two of the coventurers, who thereby realized profits in excess of the fixed-fee. See R. 27-43.

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